

On page 2, paragraph 3 of the Final Rejection the Examiner states that the Affidavit under 37 C.F.R. 1.132 is insufficient to overcome the rejection because the Affidavit fails to provide hard evidence which established the claimed product fills a long felt need or resulted in commercial success. The Examiner makes a number of statements in responding to the Amendment that bridge pages 2 and 3 of the Office Action. These statements will be addressed one at a time, as set forth hereinafter.

The Examiner's first statement is "while the Applicant sets forth multiple statements related to the product's success and the Applicant's opinion why the product fills a long felt need, the Applicant fails to include any factual evidence which supports these statements".

First, why should actual evidence be needed? The Inventor has provided the original affidavit, which was notarized, and clearly stated therein that the Edge towel has enjoyed commercial success. If the Inventor lied, thus committing Fraud on the Patent Office, the entire patent would be unenforceable. With this penalty in mind, the Inventor only made truthful statements. Is providing the Patent Office with factual data more probative evidence than the Inventor's own statements? Not according to *In re Tiffin and Erdman* cited in the remarks of Applicant's Response of November 20, 2002. With over 200 years of legal history in the U. S., it is clear that courts highly favor actual testimony, such as Affidavits, over raw factual data. Nevertheless, in spite of the above explanation, attached herewith is a Supplemental Affidavit supplying confidential sales and financial figures related to the Edge towel, as well as letters and various correspondence from competitors who clearly would like to, or have tried to knock off the present invention.

In the next paragraph on page 2 of the Office Action, the Examiners states that Applicant needs to produce evidence such as market share or other factual evidence that would show how the towel has succeeded versus all competitors. The Examiner states that there is no evidence to show how successful the product has been in the market as compared to all competitors in the field. First, the towel industry is small. There is no trade association that can legally provide sales figures in the relevant industry. The textile market itself does have a trade association but it has no subgroup for towels. If Devant solicited

sales data from its competitors – this would be an antitrust violation. And because no one wants to be involved in an antitrust violation, no one will provide such figures.

Second, the Examiner should know that the textile market did poorly in 2001 and 2002 as compared to 2000. Devant was no exception as its sales dropped 11.5%. On the other hand, the number of Edge products produced and sold increased greater than 5 times during this same period and the same is true for its dollar sales figure. Assuming that all other competitors had down years, as Devant did, data submitted herewith clearly shows that the Edge towel was growing.

The Examiner further states that Applicant bears the burden of proof of establishing a nexus between the claimed invention and evidence of commercial success and that the success is due to the claimed invention. Other than the broad general statement, the Examiner has offered no specific and detailed comments that the Applicant has not already established the nexus between the claimed invention and the evidence of commercial success. The bear proof of this lies in the fact that the claims are narrow and specific to the Edge towel. The Edge towel covers each of the types of Edge towels set forth in the Supplemental Affidavit of success. The original Affidavit of success set forth the fact that it was created due to the inability and limitations of the jacquard process. Specifically the original Affidavit says that by weaving a jacquard woven perimeter and having a graphic impression added to the towel overcomes the prior obstacles of being able to use a limited number of colors in a woven graphic impression. This and other limitations in the claims are the nexus.

If the Examiner believes that Inventor/Applicant has not established the nexus between the claimed invention and the evidence of commercial success, certainly the Examiner ought to specifically point out the deficiencies. Lack of any specific deficiencies listed by the Examiner is indicative of the fact that the Examiner must believe that the claimed invention and the evidence of commercial success are satisfactorily entwined.

In the sentence bridging pages 2 and 3 of the Office Action, the Examiner states that *Applicant's statement that the claimed subject matter solved the problem that was long standing in the art, while on the other hand lacking a showing that others of ordinary skill in the art were working on the problem and if so, for how long* is perhaps best answered by the Supplemental Affidavit submitted herewith. While the Supplemental Affidavits do not state that others were working on this problem or that they even recognize the problem, the fact that the Edge towel has had so much commercial success, and in particular the fact that its sales have increased more than 5 fold in the years 2000 – 2002 indicate that the marketplace recognize the superior product and that there was a long felt need for this. The lack of evidence relative to what others of ordinary skill in the art were doing is only one of many factors the Examiner should consider in evaluating commercial success. If many other factors are present, and this one factor is not present, this does not demonstrate that there is a lack of commercial success. Nowhere in the MPEP, nor in any case law is there an explanation as to what factors are minimally required for proving commercial success. Instead, the courts recognize, and the MPEP supports such, by suggesting that there are many factors which one can consider when evaluating commercial success.

The first full sentence atop page 3 of the Office Action, the Examiner says that there is no evidence that those skilled in the art knew of the teachings of the above-cited references and that they were still unable to solve the problem. On the other hand, there is no reason to suggest that they did not know of the prior art. And yet the present Inventor created the Edge towel. As set forth below, relative to the rejections, it is submitted that even if those skilled in the art knew of the teachings of the cited reference they would still not arrive at the claimed invention because the cited references do not disclose all the elements of the claimed invention. "Knowing the cited references" would not help those skilled in the art relative to the present invention.

On page 3, the Examiner states that evidence of infringement can be used to establish the long felt need was present in the marketplace. The Examiner states that Applicant has submitted no evidence detailing competitors trying to copy the invention. With the introduction of the Supplemental Affidavit, evidence is submitted to provide these details.

As set forth in the Supplemental Affidavit, two of Devant's biggest competitors have copied the Edge towel, but were persuaded to stop because of this patent application. The first event was noted at the PGA (Professional Golf Association) show in early 2001 where Tommy Hilfiger voluntarily pulled its product on the first day of the show, after speaking with the Inventor about the Edge towel. The second event was the result of a conversation discussing Admanco's towel, and their voluntarily agreement not to sell their knock-off towel.

There are many factors to consider in evaluating commercial success. The Examiner has listed some of the factors, the MPEP lists many of these and other factors, and the court cases also set forth factors that are relevant in considering commercial success. The Affidavit was submitted with the response on November 20, 2002. Applicant has not had a proper chance to respond to the allegations of the Examiner set forth in the final rejection relative to the Examiner's statement that there is a lack of commercial success shown by the Affidavit. Applicant submits that this Amendment After Final is the first opportunity Applicant has had to address some of the issues the Examiner has put forth on the record for the first time. Even if the Examiner is not convinced that the Affidavit along with the Supplemental Affidavit still support commercial success, the Examiner is strongly urged to enter the Supplemental Affidavit for purposes of appeal.

On page 3, paragraph 7 of the Office Action, the Examiner rejects all the claims under 35 U.S.C. 103 as being unpatentable over Hobson in view of Carpenter et al. This rejection is the only rejection in the case. The Examiner sets forth many of the features of both Hobson and Carpenter et al. and concludes that it would have been obvious of one of ordinary skill in the art to chose various printed designs, as well as chose where to place the printed image on the Hobson product to create various printed products which are visually and aesthetically pleasing to consumers. This rejection is respectfully traversed for the following reasons.

Claims 21 and 29 are the independent claims. The following table sets forth the elements of both claims 21 and 29 and views these with respect to the rejection of Hobson

vs. Carpenter. Claim 21 starts by calling for weaving a towel on a jacquard loom using at least 2 different colors. Hobson teaches away from using jacquard looms in column 2, line 18. Carpenter, on the other hand has a jacquard loom as item 26. It is unclear how the Examiner intends to combine Carpenter with Hobson since Hobson teaches away from using a jacquard loom and yet Carpenter teaches using a jacquard loom. These teachings are like oil and water and are not meant to be mixed.

Claim 21 calls for a border having a first color that is woven adjacent each edge on one side of the towel. Neither Hobson nor Carpenter has this feature. The Examiner notes that Hobson has a product which can have blue floral "borders" on one side and gold floral "borders" on the opposite side. However, these are not borders. These are merely stripes. A border is something that goes continuously around the entire edge of the product, as clearly set forth in Claim 21. Claim 21 states that the border is adjacent "each edge". It is clear that the floral stripes of Hobson are only adjacent 2 edges but are not adjacent the third and fourth edge of a two-dimensional product. Furthermore, there is no way one skilled in the art can modify Hobson or Carpenter and place a "border" on all edges without totally ignoring the teachings of these references.

Claim 21 continues by stating that a border having a second color is adjacent each edge of the towel on its other side. Again neither Hobson nor Carpenter has this for the same reason set forth above, i.e., Hobson/Carpenter teaches stripes but not borders adjacent "each edge" of the towel.

Claim 21 continues by stating that the towel has a central area within the borders on both sides of the towel. While there is central area in any two-dimensional product, this central area claimed in Claim 21 must be within the borders. The lack of borders by both Hobson/Carpenter makes the location of the central area on the towel unclear to those skilled in the art.

Claim 21 continues by stating that the central area on one side is in a first color while the central area on the other side is in a second color. Neither Hobson nor Carpenter teach

that the color on a towel is such that the central area on a first side and the borders on the second side are of one color while the central area of the second side and the borders of the first side are of a second color. This is how Devant sets up the Jacquard loom to make the Edge towel.

Lastly, Claim 21 calls for forming a graphic impression in the central area on one of the sides. Neither Hobson nor Carpenter has a graphic impression in the central area. As stated clearly in the response of November 20, 2002 both Hobson and Carpenter print a design on the warp fibers only of a product to be woven. This does not teach Applicant's invention.

In considering Claim 29 it calls for a textile having edges adjacent its periphery. Both Hobson and Carpenter have this feature.

Claim 29 continues by calling for a textile having first and second sides and again both Hobson and Carpenter have this.

Claim 29 calls for each side having adjacent said edges and surrounding a central area. Neither Hobson nor Carpenter have borders surrounding each edge of the towel and correspondingly, neither surround a central area.

Claim 29 calls for the graphic impression to be positioned only within the central area on one side. Neither Hobson nor Carpenter have this feature in that it is unclear to those skilled in the art where a central area is because there is no border that surrounds a central area. Accordingly one skilled in the art would not only be confused about where a central area might be, but would likewise be confused about where a graphic impression should be positioned.

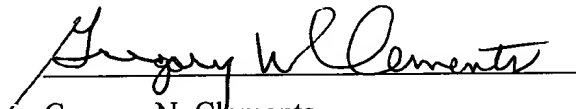
The last 2 limitations of Claim 29 are with respect to the color of the border in the central area. Specifically, the border on the first side and the central area on the second side

have a first color while the central area on the first side and the border on the second side have a second color. Neither Hobson nor Carpenter teaches these limitations.

At the middle of page 5 the Examiner states that in the present case the final product, i.e. a towel with graphic impression, would be produced whether the yarn was printed before weaving or the fabric is woven and then printed. While this statement by the Examiner is in effect trying to explain that product by process claims are looked at differently by the Patent Office, it does not mean that it is obvious to those skilled in the art that yarns that are printed before woven or fabric is woven and then printed are equivalent. In fact, if this were true, then at least one of Hobson in view of Carpenter ought to disclose this feature. The lack of prior art illustrating an invention in which the fabric is woven and then printed is surprising. All along, Applicant has been criticizing the application of Hobson and Carpenter relative to the present invention. Simply put, if this is the best prior art the Examiner can find relative to the present invention, the present invention sets forth many features not disclosed by these references which are relevant to the patentability of the claims as explained previously.

In view of the Supplemental Affidavit, and the above remarks, it is submitted that the present application places the claims in condition for allowance and such is earnestly solicited. Should the Examiner, however, still be unpersuaded by these remarks and the Supplemental Affidavit, it is requested that the Examiner at least enter the Supplemental Affidavit for purposes of appeal.

Respectfully submitted,



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## NOTES FOR DEVANT DOCKET# 2827

## Claim 21

## Hobson v. Carpenter

Weaving a towel on a Jacquard loom using at least 2 different colors.	Hobson teaches away from Jacquard loom, col. 2, line 18 Carpenter has Jacquard loom item 26
Such that a border having a 1 <sup>st</sup> color is woven adj. each edge on one side thereof.	Neither Hobson nor Carpenter has this.
And a border having a second color is woven adj. each edge of said towel on the other side.	Neither Hobson nor Carpenter has this.
Said towel having a central area woven within the borders on both sides.	There is a central area but no borders.
Said central area on other side is woven with 1 <sup>st</sup> color.	There is a central area but no borders.
Said central on said one side is woven in a 2 <sup>nd</sup> color.	There is a central area but no borders.
Forming a graphic impression in said central area on said one side.	Neither Hobson nor Carpenter has this.

Claims 22 – 27 not disclosed by Hobson &amp; Carpenter.

Claim 28 – Hobson mentions shearing (Col. 2, line 33) not blooming.

## Claim 29

## Hobson v. Carpenter

A textile having edges adjacent its periphery.	Both have this.
Said textile having 1 <sup>st</sup> and 2 <sup>nd</sup> side.	Both have this.
Each side having a border adj. said edges and surrounding a central area.	Neither have this/Hobson has side edges not borders.
Graphic impression being positioned only within central area on 1 <sup>st</sup> side	Neither have this.
Said border on 1 <sup>st</sup> side & central area on 2 <sup>nd</sup> side having a 1 <sup>st</sup> color.	Neither have this.
Said centered areas on said 1 <sup>st</sup> side & said border on said 2 <sup>nd</sup> side having a 2 <sup>nd</sup> color.	Neither have this.